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IN THE

Supreme Court of the United States

October Term, 1957.

No. 992

CONSOLIDATED PACKAGING MACHINERY CORPORATION,

Respondent,

vs.

RICHARD J. KELLY, Executor, Etc.,

Petitioner.

RICHARD J. KELLY, Executor, Etc.,

Petitioner,

vs.

INTERNATIONAL PAPER COMPANY,

Respondent.

BRIEF IN OPPOSITION FOR RESPONDENTS, CONSOLIDATED AND INTERNATIONAL

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May 27, 1958.

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The Opinion Below

The opinion of the Court of Appeals for the Seventh Circuit has now been reported in 253 F. 2d 49.

Statement of Case

Respondent, Consolidated, by an agreement dated June 3, 1944, became the exclusive licensee of petitioner, Kelly, to make and sell cottoners under a single Kelly patent (App. 12070, pp. 6-14).

Consolidated, by another agreement, also was a licensee of Lakso "to manufacture and sell another type of cottoner" (Kelly's Petition, p. 4; see also App. 12070, p. 17) under two Lakso patents (App. 12070, pp. 19-21).

The Kelly license fixed the maximum and minimum prices at which Consolidated not only might sell Kelly machines, but, additionally, Lakso type machines as well.*

Consolidated sued to have the Kelly agreement declared invalid and unenforceable (App. 12070, pp. 4-5).

The matter came on before the District Court on the motions of both parties for summary judgment (App. of Consolidated, 12070, pp. A1-A4), it being conceded that there was "no genuine issue as to any material fact" (App. of Consolidated, 12070, p. A1; Kelly's Petition, p. 6).

The District Court held that Paragraph 9

> "constitut[ed] a fixing of prices by Kelly without patent or other statutory authorization." (App. 12070, p. 28; see also pp. 27-31);

and that Consolidated was

> "entitled, as a matter of law, to judgment in its favor." (App. 12070, p. 26; see also pp. 26-27).

Upon appeal, the Court of Appeals for the Seventh Circuit concluded

> "Only an issue of law was presented for decision by the trial judge and the result reached by him was correct. We think the challenged license agreement an integrated price-fixing arrangement between the

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* "9. It is further agreed between the parties hereto that the minimum price per machine of either type shall be Two Thousand Five Hundred Dollars ($2,500.00) and that the maximum price on standard machines shall be Five Thousand Dollars ($5,000.00) unless the machines embody special features of construction, and that such price range shall be maintained unless changes therein are mutually agreed to in writing."

parties and in violation of the Sherman Act, 15 U. S. C. § 1 . . ." (Kelly's Petition, p. 14).

Kelly vs. *International Paper Company* (No. 12071 below) was an action by Kelly for allegedly inducing Consolidated's breach of the agreement of June 3, 1944. The District Court held

> "that no action lies for inducing breach of plaintiff's contract here because the contract itself is unenforceable." (App. 12071, pp. 58-59)

and the Court of Appeals held that

> "Granting International's motion for summary judgment in this companion case was correct. The critical contract was unenforceable." (Kelly's Petition, p. 14).

Argument

The Petition does not even assume to show that any of the "special and important reasons" for granting the writ, as set forth in this Court's Rule 19, are presented by this case.

None can be shown, and, in fact, the decision below directly follows a long line of decisions by this Court: *Ethyl Gasoline Corp.* v. *U. S.*, 309 U. S. 436, 456-459 (1940); *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488, 491-492 (1942); *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495, 497-498 (1942); *U. S.* v. *Masonite Corp.*, 316 U. S. 265, 277-282 (1942); *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661, 664-667 (1944); *International Salt Co.* v. *U. S.*, 332 U. S. 392, 395-396 (1947); *United States* v. *Line Material Co.*, 333 U. S. 287, 307-310 (1948); *United States* v. *New Wrinkle, Inc.*, 342 U. S. 371, 377-379 (1952).

Here, it is not disputed and, in fact, is admitted (Kelly's Petition, pp. 7, 8) that Paragraph 9 of the June 3, 1944 agreement fixed the price at which Consolidated might sell cottoners, with respect to which Kelly had no rights and

over which he had no control. The fact that Kelly might have fixed the prices on cottoners made under his own patent is immaterial. Certainly, however, in the words of this Court in the *Ethyl Gasoline* case, *supra*, he

> "may not, by virtue of his patent . . . condition the license so as to control conduct by the licensee not embraced in [his] patent monopoly . . ." (309 U. S. 456)

and

> "The patent monopoly of one invention may no more be enlarged for the exploitation of a monopoly of another . . . than for the exploitation of an unpatented article, . . . or for the exploitation or promotion of a business not embraced within the patent." (309 U. S. 459).

Kelly has never contended that the Lakso machines were "embraced in [his] patent monopoly". Here he refers to them as "another type of cottoner" (Kelly's Petition, p. 4), and as "competing products" (Kelly's Petition, p. 7). Therefore, Kelly did "condition" the agreement of June 3, 1944, "so as to control conduct by [Consolidated] not embraced in the [Kelly] patent monopoly", and Paragraph 9 is illegal *per se* under the Sherman Act.

And this illegality is in no way affected by the fact that, instead of fixing precise or definite prices, Paragraph 9 established a floor and a ceiling within which the sales of Consolidated had to be made. Thus, in *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), the court said (p. 222):

> "Hence, prices are fixed within the meaning of the *Trenton Potteries* case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon."

In fact, the rule against price fixing covers the fixing of minimum prices alone or of maximum prices alone. Thus, in *Schine Theatres* v. *United States*, 334 U. S. 110 (1948), this Court said (p. 120):

> "It is well settled that the fixing of minimum prices, like other types of price fixing, is unlawful *per se*."

And in *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951), this Court said (p. 213):

> "The Court of Appeals erred in holding that an agreement among competitors to fix maximum resale prices of their products does not violate the Sherman Act. For such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."

Notwithstanding all this, the Petition assumes to justify price fixing here because, Kelly says, "The prices fixed in the license of June 7, 1944 were not designed to restrain competition but, rather, to protect the licensor." (Kelly's Petition, p. 8). Kelly's design, however, is immaterial. The statement of this Court in *United States* v. *McKesson & Robbins*, 351 U. S. 305 (1956) is pertinent (pp. 309-310):

> "It has been held too often to require elaboration now that price fixing is contrary to the policy of competition underlying the Sherman Act and that its illegality does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable. It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices" (footnotes omitted).

Conclusion

The petition for certiorari should be denied.

Respectfully submitted,

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